90-1897

No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

UNITED ARTISTS COMMUNICATIONS, INC., et al.,
Petitioners,

vs.

THE MOVIE 1 & 2, a general partnership,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an allocation of movies among motion picture exhibitors (i.e., a "split") -- with the knowledge and participation of movie distributors -- should be condemned as illegal per se under Sherman Act §1 or judged under the "rule of reason" as a non-price vertical restraint.

2. Whether a motion picture exhibitor can have monopoly power, as required by §2 of the Sherman Act, where there are no barriers to entry and the exhibitor exercises no control over the market's productive assets (i.e., the distributors' copyrighted films).

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
I. THE CIRCUITS ARE DIVIDED AS TO WHETHER A DISTRIBUTOR-PARTICIPATION SPLIT AGREEMENT IS PER SE ILLEGAL	4
II. THERE CAN BE NO MONOPOLY POWER WHERE THERE IS NO CONTROL OVER THE MARKET'S PRODUCTIVE ASSETS AND NO BARRIERS TO ENTRY	7

TABLE OF AUTHORITIES

PAGES

CASES

A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396 (7th Cir. 1989) 8

Abadir & Co. v. First Mississippi Corp., 651 F.2d 422 (5th Cir. 1981) 7

Admiral Theatre Corp. v. Douglas Theatre Co., 437 F.Supp. 1268 (D. Neb. 1977), aff'd., 585 F.2d 877 (8th Cir. 1978) 3, 5

Arizona v. Maricopa County Medical Soc., 457 U.S. 332 (1982) 5

Ball Memorial Hospital v. Mutual Hospital Insurance, Inc., 784 F.2d 1325 (7th Cir. 1986) 8

Balmoral Cinema, Inc. v. Allied Artists Pictures Corp., 885 F.2d 313 (6th Cir. 1989) 4-7

Business Electronics Corp. v. Sharp Electronics Corp., ___U.S.___, 108 S.Ct. 1515 (1988) 7

Colorado Interstate Gas v. Natural Gas Pipeline, 885 F.2d 683 (10th Cir. 1989) 8

Copy-Data Systems, Inc. v. Toshiba America, Inc., 663 F.2d 405 (2nd Cir. 1981), cert. denied, 474 U.S. 825 (1985) 7

Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17 (9th Cir. 1971) 3

Donald B. Rice Tire Co. v. Michelin Tire Corp., 638 F.2d 15 (4th Cir. 1981), cert. denied, 454 F.2d 864 (1981) . . 7

General Cinema Corp. v. Buena Vista Dist. Co., 532 F.Supp. 1244 (C.D. Cal. 1982) 6

Greenbrier Cinemas, Inc. v. Attorney General, 511 F.Supp. 1046 (W.D. Va. 1981) 5

Harkins Amusement Enterprises, Inc. v. General Cinema Corp., 850 F.2d 477 (9th Cir. 1988), cert. denied, 488 U.S. 1019 (1989) 4, 6

Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409 (7th Cir. 1989) 8

International Boxing Club of New York v. United States, 358 U.S. 242 (1959) . 9

Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) . 3, 9

Northwest Power Products, Inc. v. Omark Industries, Inc., 576 F.2d 83 (5th Cir. 1978), cert. denied, 439 U.S. 1116 (1979) 6

Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987) 7

Ryko Mfg. Co. v. Eden Services, 823 F.2d 1215 (8th Cir. 1987), cert. denied,

108 S.Ct. 751 (1988) 7

Schachar v. American Academy of Opthomology, Inc., 870 F.2d 397 (7th Cir. 1989) 8

Seago v. North Carolina Theatres, Inc., 42 F.R.D. 627, aff'd on dist. ct. op., 388 F.2d 987 (4th Cir. 1967), cert. denied, 390 U.S. 959 (1968) 5

U.S. v. Waste Management, Inc., 743 F.2d 976 (2d Cir. 1984) 9

United States v. Capitol Service, Inc., 756 F.2d 502 (7th Cir. 1985), cert. denied, 474 U.S. 945 (1985) 6

United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956) 9

United States v. Grinnell Corp., 384 U.S. 563 (1966) 9

United States v. Kerasotes-Illinois Theatres, Inc., 1986-2 Trade Cases ¶67,400 (C.D. Ill. 1987) 5

United States v. Syufy Enterprises, 03 F.2d 659 (9th Cir. 1990) 9

United States v. Topco Associates, Inc., 405 U.S. 596 (1972) 5

Viking Theatre Corp. v. Paramount Film Distributing Corp., 320 F.2d 285 (3rd Cir. 1963), aff'd by equally divided Ct., 378 U.S. 123 (1964) 5

White Motor Co. v. United States, 372 U.S. 253 (1963) 5

STATUTES

15 U.S.C. §1 2

15 U.S.C. §2 2

28 U.S.C. §1254(1) 2

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

UNITED ARTISTS COMMUNICATIONS, INC., ET AL.,

Petitioners,

vs.

THE MOVIE 1 & 2, a general partnership,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, as amended, reversing summary judgment is reported at 909 F.2d 1245 (9th Cir. 1990) and is reprinted as Appendix A.

The Ninth Circuit denied a timely petition for rehearing and suggestion for rehearing en banc on March 14, 1991, and that order is reprinted in Appendix B. The opinion of the District Court granting summary judgment and dismissing state claims is reported at 681 F.Supp. 654 (N.D. Cal. 1987) and is reprinted in Appendix C.

JURISDICTIONAL STATEMENT

The Ninth Circuit's opinion was filed on May 14, 1990, and amended on July 25, 1990. On March 14, 1991, the Ninth Circuit denied a timely petition for rehearing and suggestion for rehearing en banc. Jurisdiction of this Court is founded upon 28 U.S.C. §1254(1).

STATUTES INVOLVED

The Sherman Act, 15 U.S.C. §1, provides in relevant part:

Every contract,

> combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal....

The Sherman Act, 15 U.S.C. §2, provides in part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor....

STATEMENT OF THE CASE

In the university town of Santa Cruz, California, the Nickelodeon is a prototype "art theatre" with four small auditoriums of 50, 102, 168 and 243 seats and an espresso bar. Petitioner United Artists Communications, Inc. ("UAC"), in contrast, operates five typical shopping center and free

standing theatres having a total of 12 screens. Respondent Movie 1 & 2 runs a two screen theatre "in a converted storefront which it shares with a moped shop," each auditorium having 225 seats. [App. A-7.]

Respondent was usually unsuccessful in its attempts to license first run films. Like most antitrust cases arising in the motion picture industry, respondent complains its failure to license the highest-grossing films was not attributable to the relative quality of its storefront theatre or the size of its bids but, instead, the result of a conspiracy. The alleged conspiracy has two components.

First, respondent alleges that Nickelodeon and UAC entered a split agreement whereby Nickelodeon agreed to exhibit only "art pictures" while UAC

exhibited "commercial films."[1] Given the undisputed size, location, construction and appointments of Nickelodeon's and UAC's theatres, however, any such split agreement would have been entirely superfluous: one would expect the Nickelodeon to show only art films. Accordingly, UAC possessed the dominant share of revenues from the exhibition of commercial films in the market.

Second, respondent alleges the film distribution companies participated in the exhibitors' scheme, licensing their films in accordance with the split's art/commercial allocation.

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[1] As the Court below explained, "a split agreement is an exhibitor agreement which divides a normally competitive market by allocating films to particular members with the understanding there will be no bidding among members for licensing rights to the films assigned." [App. A-8.]

Proof of such distributor participation in the exhibitors' alleged split is essential to respondent's case because, without it, respondent lacks antitrust standing.[2] The Ninth Circuit ruled there was sufficient evidence of the distributors' participation in the alleged split to require a trial. App. A-14 to A-16.

The Distributors' Petition, No. 90-1593 raises significant issues regarding respondent's "proof" of the distributors' participation in the alleged split. This petition, however, assumes the distributors knowingly

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[2] Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 20 (9th Cir. 1971); Admiral Theatre Corp. v. Douglas Theatre Co., 437 F.Supp. 1268, 1294 (D. Neb. 1977), aff'd., 585 F.2d 877 (8th Cir. 1978). Cf. Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (a conspiracy between competitors to fix prices does not injure a non-participating competitor since it stands to "gain from any conspiracy to raise the market price.")

participated in the exhibitors' alleged art/commercial allocation agreement -- i.e, it assumes a "distributor-participation split" -- and asks the Court to review the lower court's holding that such a consensual, vertical distribution arrangement would be illegal per se. Also, UAC petitions the Court to review the lower court's holding that UAC could possess monopoly power even though it does not control the flow of the distributors' copyrighted films into the market and there are no barriers to entry by new exhibitors wishing to license those films.

I. THE CIRCUITS ARE DIVIDED AS TO WHETHER A DISTRIBUTOR-PARTICIPATION SPLIT AGREEMENT IS PER SE ILLEGAL

The Ninth Circuit ruled in this case that a split agreement between two exhibitors, in which motion picture

distributors also participate, is illegal per se. [App. A 18-19]. With a paucity of discussion, the Court of Appeals concluded the district court had erred in applying the rule of reason to a (presumed) vertical distribution mechanism for the licensing of motion pictures: "It should have applied the illegal per se rule." [App. A-18]. This holding is based on dicta in Harkins Amusement Enterprises, Inc. v. General Cinema Corp., 850 F.2d 477 (9th Cir. 1988), cert. denied, 488 U.S. 1019 (1989) and is in direct conflict with the holding of the Sixth Circuit in Balmoral Cinema, Inc. v. Allied Artists Pictures Corp., 885 F.2d 313 (6th Cir. 1989).

The sole issue in Balmoral was whether the per se rule or rule of reason analysis should be employed in a situation identical to the instant case.

885 F.2d at 314. There, in an action by an exhibitor-plaintiff alleging distributor participation in an exhibitor split, the Sixth Circuit held that the trial court properly applied the rule of reason, not the per se rule. 885 F.2d at 317. Other courts have issued similar rulings.[3]

The plain conflict between the Ninth Circuit and the Sixth Circuit is underscored by an unresolved conflict in this Court. In Viking Theatre Corp. v.

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[3] See Seago v. North Carolina Theatres, Inc., 42 F.R.D. 627, 638, aff'd on dist. ct. op., 388 F.2d 987 (4th Cir. 1967), cert. denied, 390 U.S. 959 (1968); Admiral Theatre Corp. v. Douglas Theatre Corp., 437 F.Supp. 1268, 1293 (D.C. Neb. 1977), aff'd 585 F.2d 877 (8th Cir. 1978); Greenbrier Cinemas, Inc. v. Attorney General, 511 F.Supp. 1046, 1060 (W.D. Va. 1981). For an excellent discussion of the Justice Department's and the courts' schizophrenia on the standard of antitrust review for distributor-participation splits, see United States v. Kerasotes-Illinois Theatres, Inc., 1986-2 Trade Cases ¶67,400 (C.D. Ill. 1987).

Paramount Film Distributing Corp., 320 F.2d 285, 293 (3rd Cir. 1963), aff'd by equally divided Ct., 378 U.S. 123 (1964), four justices of this Court agreed that a non-coercive, distributor-participation split was a legitimate industry practice that could not be condemned per se; four other justices disagreed.

The Ninth Circuit's holding not only creates a conflict among the circuits, it also neglects this Court's directives "that a new per se rule is not justified until the judiciary obtains considerable rule of reason experience with the particular type of restraint challenged." Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 349 n. 19 (1982) (emphasis in original). See also, United States v. Topco Associates, Inc., 405 U.S. 596, 607-8 (1972); White Motor Co. v. United

States, 372 U.S. 253, 263 (1963); Northwest Power Products, Inc. v. Omark Industries, Inc., 576 F.2d 83 (5th Cir. 1978), cert. denied, 439 U.S. 1116 (1979) ("the usual assumption is that a per se rule would grow out of a history of rule of reason cases all arriving at the same verdict." Id. at 88). Yet, the federal reports are devoid of cases finding that split agreements -- operating with the consent and participation of distributors -- unreasonably restrain trade under the rule of reason.[4]

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[4] Prior to Harkins, the only two reported decisions which held a split to be illegal involved exhibitor-only splits which were used coercively against distributors. See, United States v. Capitol Service, Inc., 756 F.2d 502, 506 (7th Cir. 1985), cert. denied, 474 U.S. 945 (1985); General Cinema Corp. v. Buena Vista Dist. Co., 532 F.Supp. 1244, 1279 (C.D. Cal. 1982). These two cases which analyzed the exhibitor-only splits as horizontal price-fixing schemes directed against distributors are clearly distinguishable

A distributor-participation split is a form of vertical restraint which neither restricts output nor limits "interbrand" competition among different motion pictures being exhibited in the marketplace. As the Sixth Circuit recognized in Balmoral,

> Here we are dealing with group conduct originated by the purchasers of films -- the exhibitors, not by the sellers. The sellers responded to the purchasers' conduct by consenting to sell films to purchasers engaged in a group buying program. ... The practice at issue does not facially appear always to restrict competition, decrease output or raise prices. Rather it may simply lower prices paid by exhibitors to distributors ... such action may lower prices to moviegoers at the box office and may serve rather than undermine consumer welfare.

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from a distributor-participation split such as respondent alleges here.

885 F.2d at 316-7.[5] Accordingly -- in direct conflict with the decision below -- the Balmoral court held distributor-participation splits must be evaluated under the rule of reason. Cf. Business Electronics Corp. v. Sharp Electronics Corp., ___U.S.___, 108 S.Ct. 1515 (1988) ("we have recognized that the scope of per se illegality should be narrow in the context of vertical restraints.")

This Court should grant certiorari to resolve the conflict between the Ninth Circuit and Sixth Circuit and to establish decisively the

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[5] The Balmoral court noted the split was not formed to drive the plaintiff out of business. 885 F.2d at 316. Here, respondent introduced evidence tracing the alleged Santa Cruz split back to the early 1970's, at least a decade before respondent opened its theatre. [App. A 11-12]. Clearly, the alleged long-running split was not formed to drive respondent out of business. Moreover, respondent conceded below that the split had no adverse effect upon consumers.

standard of analysis to be applied in cases of distributor-participation split agreements or other hybrid vertical-horizontal distribution arrangements.[6]

II. THERE CAN BE NO MONOPOLY POWER WHERE THERE IS NO CONTROL OVER THE MARKET'S PRODUCTIVE ASSETS AND NO BARRIERS TO ENTRY

The Ninth Circuit concluded that UAC's high market share for first run commercial movies in the Santa Cruz area created an inference of monopoly power. While recognizing that "market share

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[6] Other circuits analyze hybrid vertical-horizontal distribution arrangements -- such as a distributor-participation split -- under the rule of reason. See, e.g., Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 216 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987); Copy-Data Systems, Inc. v. Toshiba America, Inc., 663 F.2d 405, 411 (2nd Cir. 1981), cert. deniend, 474 U.S. 825 (1985); Donald B. Rice Tire Co. v. Michelin Tire Corp., 638 F.2d 15, 16 (4th Cir. 1981), cert. denied, 454 F.2d 864 (1981); Abadir & Co. v. First Mississippi Corp., 651 F.2d 422, 427 (5th Cir. 1981); and Ryko Mfg. Co. v. Eden Services, 823 F.2d 1215, 1231 (8th Cir. 1987), cert. denied, 108 S.Ct. 751 (1988).

does not alone determine monopoly power," the Court rejected UAC's argument that market share was irrelevant because there were no barriers to entry and because the distributors indisputably control the market's "productive assets," i.e., their copyrighted films. [App. A 21-22].

The Ninth Circuit's market power analysis plainly conflicts with that of the Seventh Circuit. In Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1414 (7th Cir. 1989), the court stated the proper approach:

> . . . while market share may indicate market power in certain cases, the two are not necessarily the same. Market share indicates market power only when sales reflect control of the productive assets in the business, for only then does it reflect an ability to

> curtail total market output. [Citation omitted.] If a firm's share of market sales does not reflect control of a significant percentage of the market's productive assets, it does not indicate market power. [Emphasis added].

Accord Colorado Interstate Gas v. Natural Gas Pipeline, 885 F.2d 683 (10th Cir. 1989); A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396 (7th Cir. 1989); Schachar v. American Academy of Opthomology, Inc., 870 F.2d 397 (7th Cir. 1989).

Since UAC does not own, and can never own, the "productive assets" from which its market share is generated, it has "no power at all to cut back on the market's output" of first run films. Ball Memorial Hospital v. Mutual Hospital Insurance, Inc., 784 F.2d 1325, 1336 (7th Cir. 1986); Indiana Grocery, supra, 864 F.2d at 1414. That

economic truth is even more evident in an industry -- such as the movie exhibition business -- where (as the Court below has acknowledged) there are no barriers to entry and new theatres may be built relatively easily. United States v. Syufy Enterprises, 903 F.2d 659 (9th Cir. 1990) (acknowledging lack of entry barriers in movie industry; no market power despite exhibitor's 100% market share). See also, United States v. Waste Management, Inc., 743 F.2d 976, 982-983 (2d Cir. 1984) (where entry barriers are low, market share does not accurately reflect the party's market power.) In this context, therefore, it was inappropriate for the Ninth Circuit simply to equate market share with market power, without regard for the realities of the market involved. Cf. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 594 n.19

(1986) (antitrust cases must make economic sense).

This Court has provided precious little guidance to the lower federal courts on how to determine whether a firm possesses monopoly power.[7] The Court should grant certiorari to resolve the conflict between the Ninth Circuit and the Seventh Circuit and to establish that market power must be measured in accord with economic reality -- including control over the market's

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[7] See, United States v. Grinnell Corp., 384 U.S. 563, 571 (1966); International Boxing Club of New York v. United States, 358 U.S. 242, 249 (1959); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).

"productive assets" and any barriers to entry -- not merely market share.

Respectfully submitted,

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June 26, 1991

APPENDIX A

Order and Amended Opinion of the
United States Court of Appeals for the Ninth Circuit in
Movie 1 & 2 v. United Artists Communications
Reported at 909 F.2d 1245 (9th Cir. 1990)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE MOVIE 1 & 2, a general partnership,

Plaintiff-Appellant,

v.

UNITED ARTISTS COMMUNICATIONS, INC.; PARAMOUNT PICTURES CORPORATION; COLUMBIA PICTURES INDUSTRIES, INC.; TRI-STAR PICTURES, INC.; TWENTIETH CENTURY FOX FILM CORPORATION; UNIVERSAL FILM EXCHANGES, INC.; MGM/UA DISTRIBUTION COMPANY; ORION PICTURES DISTRIBUTION CORPORATION; ORION CLASSICS, a division of Orion Pictures Corporation; and BUENA VISTA DISTRIBUTION CO., INC.,

Defendants-Appellees.

No. 88-1734

D.C. No. C 86-20390 RPA

ORDER AND AMENDED OPINION

Appeal from the United States District Court for the Northern District of California
Robert P. Aguilar, District Judge, Presiding

Argued and Submitted
August 16, 1989—San Francisco, California

Filed May 14, 1990
Amended July 25, 1990

Before: Richard H. Chambers and Charles Wiggins, Circuit Judges, and Rudi M. Brewster*, District Judge.

*Hon. Rudi M. Brewster, United States District Judge for the Southern District of California, sitting by designation.

Opinion by Judge Brewster

SUMMARY

Antitrust/Evidence

Reversing and remanding the district court's grant of summary judgment, the court of appeals held that in evaluating unreasonable restraint of trade allegations, the illegal per se rule must be applied to split agreements.

This case involved allegations by appellant The Movie 1 & 2, a general partnership consisting of Harold Snyder and his two sons, David and Larry, that appellee motion picture exhibitors, United Artists Communications, Inc. and the Nickelodeon, entered into an illegal agreement in which appellees, 19 major film distributors, participated and that the exhibitors attempted to monopolize, conspired to monopolize, and did monopolize the film exhibition market in Santa Cruz, California. Appellant alleged that The Movie was unable to obtain licenses to first-run commercial or art films from the distributors who concertedly refused to deal with it. Appellant alleged that the distributors cooperated in an illegal split agreement between UA and Nickelodeon, whereby nearly all first-run commercial films were licensed to UA and nearly all first-run art films were licensed to the Nickelodeon. Appellant also alleged that the split agreement in this case was part of a boycott against The Movie, which had the purpose of eliminating it as a competitor, a restraint of trade in violation of the Sherman Act, 15 U.S.C. § 1 (1982). Appellant alleged that UA maintained a monopoly on first-run commercial film exhibition and that the Nickelodeon maintained a monopoly on all first-run art film exhibition in violation of section 2 of the Sherman Act. The district court, after excluding several items of evidence that it deemed inadmissible, granted appellees' multiple motions for summary judgment as to all of the antitrust claims, and The Movie appealed.

[1] Hal and David Snyder both gave deposition testimony that Al Chiarrapotti, Twentieth Century Fox's employee in charge of licensing films to Santa Cruz exhibitors, had stated to them that he did not count theatre seats in Santa Cruz because there was a split of product between exhibitors there, so that Fox did not take bids there. [2] This evidence was excluded as inadmissible hearsay at trial, but the court held that the district court erred because this was an admission by a party opponent which is not treated as hearsay. [3] The trial court also excluded as evidence the deposition testimony of the Nickelodeon's owner, Bill Raney, in which Raney stated that during the 1970's there was a split agreement between UA and a previous Santa Cruz exhibitor to allocate films so that neither party competed against the other in bidding. [4] The court found that since appellant was attempting to demonstrate previous anti-competitive conduct by UA, this evidence may have been admissible under F. R. Evid. 404(b) to show proof of motive, opportunity, intent, plan, or knowledge.

[5] The distributors possessed an absolute right to refuse to license films to The Movie so long as their decisions were based upon independent business judgment. [6] However, there was evidence at trial indicating that these distributors had refused to even receive bids from The Movie until they received threatening correspondence from The Movie's attorney. The distributors cited no legitimate business justification for this refusal. [7] It is not necessary for a plaintiff to show an explicit agreement in support of a Sherman Act conspiracy. Concerted action may be inferred from circumstantial evidence of conduct and course of dealing.

[8] Appellant also presented evidence which raised a material issue of fact as to UA's participation in an agreement in restraint of trade. The Chiarrapotti and Raney statements, erroneously excluded, provided some evidence of UA's participation in a split agreement. Absence of any evidence that UA and Nickelodeon ever bid against each other as well as the

pattern evidence indicating that UA had 96.9 percent of the revenue from first-run commercial films and Nickelodeon had 69.9 percent of the first-run commercial art films provided further support of the illegal split agreement allegation. [9] To the extent that the district court held that a split agreement should be evaluated under the rule of reason because it constituted a non-price restraint of trade, the court erred. It should have applied the illegal per se rule. [10] In this case, the split agreement was allegedly employed to restrict entry of other exhibitors into the Santa Cruz market for any film. If so, such conduct would cause antitrust injury in the form of a boycott, a conspiracy in restraint of trade in violation of the Sherman Act.

[11] The record indicated not only that appellant presented specific facts to the trial court to support its section 1 claims against all appellees, but also it appeared that there was sufficient evidence to support the section 2 monopoly claim against UA. The court reversed the grant of summary judgment and remanded the claims for trial.

COUNSEL

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Stewart H. Foreman, Shartsis, Friese & Ginsburg, San Francisco, California, for Group II Distributors.

Joel Linzner, Khourie, Crew & Jaeger, San Francisco, California, for United Artists Communications, Inc.

Charles B. Cohler, Lasky, Haas, Cohler & Munter, San Francisco, California, for The Nickelodeon Corporation.

ORDER

The opinion in the above-referenced case, filed originally on May 14, 1990, hereby is amended as follows:

The last four sentences of the paragraph beginning at the bottom of page 4788 and concluding at the top of page 4789 of the slip opinion should be deleted. In their place, the following sentences are substituted into that paragraph:

> UA seems to have drawn this theory from this court's decision in *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360 (9th Cir.), *cert. denied*, 109 S. Ct. 180 (1988), wherein we stated that "[s]ubstantial market power can persist only if there are significant and continuing barriers to entry." 838 F.2d at 366 (internal quotations omitted). UA argues that the relevant Santa Cruz market had no barriers to entry and that each film's distributor placed significant constraints on defendant's monopoly power. If borne out by the facts, this argument finds strong support in our recent decision in *United States v. Syufy Enters.*, No. 89-15475, slip op. at 4523 (6th Cir. May 9, 1990). In *Syufy*, we explained that the absence of entry barriers is always relevant to, and often determinative of, questions of monopoly power, because "[i]f there are no significant barriers to entry . . . any attempt to raise prices above the competitive level will lure into the market new competitors able and willing to offer their commercial goods and personal services for less." Slip op. at 4532. At this point in the litigation, however, UA's arguments do no more than clash with the evidence offered by appellant that UA and Nickelodeon successfully excluded potential competitors from the Santa Cruz market. In light of the conflicting evi-

dence on this issue, summary judgment was not appropriate.

OPINION

BREWSTER, District Judge:

The Movie 1 & 2 ("The Movie") appeals a district court judgment dismissing its case against numerous antitrust defendants. This case involves allegations that two motion picture exhibitors in Santa Cruz, California, entered into an illegal film licensing agreement in which 19 national film distributors participated, and that the exhibitors attempted to monopolize, conspired to monopolize, and did monopolize the film exhibition market in Santa Cruz. The United States District Court for the Northern District of California, excluding from evidence certain statements offered by The Movie that the court deemed inadmissible, granted the defendants' multiple motions for summary judgment as to all of the antitrust claims.

We reverse and remand as to all of the remaining defendants the district court's grant of summary judgment, finding that: (1) the court erred in excluding the appellant's proffered evidence; (2) a genuine issue of material fact exists as to whether the exhibitor United Artists Communications, Inc. ("UA") and the Group I distributors participated in an illegal split agreement in violation of section 1 of the Sherman Act, precluding summary judgment; and (3) a genuine issue of material fact exists as to whether the exhibitors attempted to monopolize, conspired to monopolize, or monopolized the Santa Cruz exhibition market in violation of section 2 of the Act, precluding summary judgment.

I. *BACKGROUND*

Appellant The Movie is a general partnership consisting of Harold Snyder and his two sons, David and Larry Snyder. In

February of 1984, the Snyders opened a motion picture theatre in Santa Cruz, California. The two-screen theatre, which has 225 seats in each auditorium, is located in downtown Santa Cruz in a converted storefront which it shares with a moped shop. The Snyders' intent was to exhibit both "commercial" and "art" films on a first-run basis.

The exhibitor defendants in this case were two of The Movie's competitors, UA, which operates five theatres in Santa Cruz with a total of twelve screens, and the Nickelodeon, which operates two theatres with a total of four screens. The distributor defendants included ten major motion picture distributors ("Group I") and nine smaller independent distribution companies ("Group II").[1]

The relevant geographic market in this case is the greater Santa Cruz area, which includes Aptos, Scotts Valley, and Capitola. The relevant product market is first-run motion pictures. Although theatres can either show "first-run" films or subsequently run "sub-run" films, first-run films provide the greatest grossing potential. The Santa Cruz area has only ten theatres at present. UA's five theatres exhibit primarily first-run "commercial" films. The Nickelodeon's two theatres exhibit primarily first-run and vintage "art" films.[2] The only other competitors in Santa Cruz are two non-defendant independent exhibitors who apparently show primarily sub-run films.

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[1]Since appellate oral argument, this court has dismissed The Nickelodeon, Warner Bros. Distributing Corporation, and all of the Group II distributor appellees from this case, pursuant to settlements among the parties.

[2]This circuit has recognized the existence of relevant submarkets within a product market. See *Syufy Enterprises v. American Multicinema, Inc.*, 793 F.2d 990, 994 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987), *cert. denied*, 479 U.S. 1034 (1987) (recognizing "industry anticipated top-grossing films" as a relevant market, distinct from the general film market). We are satisfied with the appellant's division of the relevant market in this case into two categories, "commercial" and "art" films.

The appellant alleges that The Movie was unable to obtain licenses to first-run commercial or art films from the defendant distributors, who concertedly refused to deal with it. Appellant alleges that the distributors cooperated in an illegal "split agreement" between UA and the Nickelodeon, whereby nearly all first-run commercial films were licensed to UA and nearly all first-run art films were licensed to the Nickelodeon. A split agreement is an exhibitor agreement which divides a normally competitive market by allocating films to particular members with the understanding that there will be no bidding among members for licensing rights to the films assigned. *Exhibitors' Serv., Inc. v. American Multi-Cinema, Inc.*, 788 F.2d 574, 576 (9th Cir. 1986).

Appellant alleges that the split agreement in this case was part of a boycott against The Movie, which had the purpose of eliminating it as a competitor, a restraint of trade in violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1982). Appellant also alleges that UA maintained a monopoly on first-run commercial film exhibition and that the Nickelodeon maintained a monopoly on first-run art film exhibition, in violation of section 2 of the Sherman Act, 15 U.S.C. § 2 (1982).

On December 22, 1987, the district court, after excluding several items of evidence which it deemed inadmissible, granted the defendants' multiple motions for summary judgment as to both the section 1 and section 2 claims and relinquished its jurisdiction of the pendent state claims.

II. *STANDARD OF REVIEW*

In reviewing a grant of summary judgment, our task is identical to that of the trial court. Viewing the evidence *de novo* in the light most favorable to the party against whom summary judgment was granted, we must determine whether the trial court correctly found that there was no genuine issue of material fact and that the moving party was entitled to

judgment as a matter of law. *Whittaker Corp. v. Execuair Corp.*, 736 F.2d 1341 (9th Cir. 1984). Our review of the trial court's rulings on the admissibility of evidence is plenary where the rulings call for the application of a legal standard, as opposed to a factual determination. *In re Japanese Electronic Products*, 723 F.2d 238, 257 (3rd Cir. 1982), *rev'd on other grounds*, 475 U.S. 574 (1986); *see also Whittaker*, 736 F.2d at 1347.

Summary judgment is disfavored in complex antitrust litigation. The Supreme Court, in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962), stated:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.

Although *Pollar* does not preclude summary judgment in the proper antitrust case, it does advise caution. *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 680 (9th Cir. 1985). Summary judgment is appropriate only in the clear absence of any significant probative evidence tending to support the complaint. *Three Movies of Tarzana v. Pacific Theatres, Inc.*, 828 F.2d 1395, 1398 (9th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988).

III. *DISCUSSION*

A. *THE TRIAL COURT'S EXCLUSION OF EVIDENCE*

1. *The Chiarrapotti Statements*

[1] The appellant argues that the trial court erred in excluding from evidence Hal and David Snyder's deposition testi-

mony of a statement purportedly made by Al Chiarrapotti, distributor Twentieth Century Fox's employee in charge of licensing films to Santa Cruz exhibitors. The Snyders both testified in substance that Chiarrapotti had stated to them that he did not count theatre seats in Santa Cruz because there was a split of product between exhibitors in Santa Cruz, so that Fox did not take bids there. The defendants filed a declaration of Al Chiarrapotti denying that he had made this statement. The trial court held that this evidence was "inadmissible and contradicted hearsay from a third person." *The Movie 1 & 2 v. United Artists Communications,* 681 F. Supp. 654, 658 (N.D. Cal. 1987).

First, appellees argue that the issue of the Chiarrapotti statements was not preserved for appeal since plaintiffs did not address defendants' explicit objections to admission of the statements either in their memorandum in opposition to the motions for summary judgment or in their oral argument at the summary judgment hearing. Appellees contend, therefore, that the correct standard for this particular question is plain error under Federal Rules of Evidence 103(d), due to appellant's failure to respond to appellee's objections to the evidence at the time it was excluded at trial. Appellees fail to note, however, that Rule 103(d) does not apply where, as here, the evidence was made known to the court.[3] Fed. R. Evid. 103(a)(2). Therefore, the correct standard for this court to apply is one of *de novo* review.

[2] Under the *de novo* standard, this court finds that the district court erred in excluding this statement as inadmissible hearsay, at least as to appellee distributor Fox. The statement, which was made by a former licensing agent for Fox, was an admission by a party opponent under Fed. R. Evid. 801(d)(2). Rule 801(d) states that an admission by a party opponent is

[3]Evidence of the Chiarrapotti statement was in the submitted deposition testimony of Harold Snyder at page 115, and the court's consideration of the statement is evidenced by its discussion in its opinion.

not to be treated as hearsay. Since, in deciding a summary judgment motion, all inferences are to be viewed in the light most favorable to the non-moving party, and since this evidence would likely have been admissible at trial, the court should have considered the statement in making its summary judgment determination.

Appellees next argue that the plaintiff failed to demonstrate that the statement qualified under Rule 801(d)(2)(D) as a statement by a party's servant concerning a matter within the scope of the employment, made during the existence of the relationship. The status of Mr. Chiarrapotti, however, was never in dispute. He was contacted by the Snyders because of his agency relationship, and the whole subject of their conversation concerned the possibility of doing business with appellee Fox, the principal of Mr. Chiarrapotti. There is no merit to appellee's position regarding the agency relationship of Mr. Chiarrapotti at the time of the alleged statements.

Furthermore, appellees argue that in order to admit the evidence against any defendant other than Mr. Chiarrapotti's employer, the statements must qualify under Fed. R. Evid. 801(d)(2)(E) as a statement by a co-conspirator made during the course and in furtherance of a conspiracy. The statements could be understood as supporting and furthering the split agreement. Since the statements, however, seem to apply only to appellees Fox and the exhibitors UA and Nickelodeon, this court concludes that the statements would be admissible, at least as to appellees Fox and UA. Such evidence of the split agreement would bear on both the section 1 and 2 claims of plaintiff.

2. *The Raney Statements*

[3] The appellant presented to the trial court the deposition testimony of the Nickelodeon's owner, Mr. Bill Raney, in which Raney stated that during the 1970's there was a split agreement between UA and a previous Santa Cruz exhibitor,

Kindair, to allocate films, so that neither party competed against the other in bidding. UA subsequently purchased Kindair's Santa Cruz theatres. The trial court excluded this evidence, stating: "Plaintiff has no standing to complain of this previous split which occurred before its entry onto the market and did not produce any antitrust injury to The Movie." *The Movie 1 & 2,* 681 F. Supp. at 658.

[4] The appellant, however, did not offer this evidence in an attempt to recover for antitrust injury resulting from the alleged split between UA and Kindair prior to The Movie's entry into the market. Rather, appellant was attempting to demonstrate previous anti-competitive conduct by defendant UA. Evidence of prior wrongs or acts may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" under Federal Rule of Evidence 404(b). *See also, Whittaker,* 736 F.2d at 1347.

At oral argument, appellant argued to the trial court that this testimony should be admitted to give an historical perspective of the anti-competitive atmosphere in the Santa Cruz exhibition market. The defendants objected to the testimony as hearsay, since it was based on statements allegedly made to Raney by Lou Lencioni, a UA employee. However, Lencioni's statements, like Chiarrapotti's, were statements by a party-opponent and, therefore, were not hearsay under the Federal Rules of Evidence. This testimony should have been considered by the trial court in deciding the motions for summary judgment.

Furthermore, appellees now argue that the testimony only evidences common legitimate business practices, with no suggestion of any illegal activity. Although Mr. Raney characterized the track system as a "split," appellees argue that he used the term in a generic sense, and his choice of words was not meant to bear any legal significance. Nevertheless, the statements were relevant and admissible. Appellee's argument

only addresses the weight to be given to them, which is a task for the jury.

B. *SECTION 1 CLAIMS: AGREEMENT IN RESTRAINT OF TRADE*

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade." 15 U.S.C. § 1 (1982). Appellant's section 1 claims allege an illegal agreement between the exhibitors and the distributors in the form of a "group boycott" aimed at excluding The Movie from the Santa Cruz theatre market.

The Supreme Court has emphasized, however, that the Sherman Act does not restrict "the long recognized right of a trader . . . engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). Because of a supplier's right to choose his customers and set his own terms, "antitrust plaintiffs are required to do more than merely allege conspiracy and unequal treatment in order to take a case to trial." *Harkins Amusement Enterprises v. General Cinema Corp.*, 850 F.2d 477, 483 (9th Cir. 1988), *cert. denied* 109 S.Ct. 817 (1989). According to the law of this circuit, once a defendant rebuts the allegations of conspiracy with "probative evidence supporting an alternative interpretation of a defendant's conduct," the plaintiff must come forward with specific factual support of its conspiracy allegations to avoid summary judgment. *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 680 (9th Cir. 1985).

The defendants in this case did offer some evidence from which a trier of fact could reasonably have found that their refusal to deal with The Movie was based on legitimate and sound business judgment. Following such a showing of a plausible and justifiable reason for a defendant's conduct, a plaintiff must provide specific factual support for its allega-

tions of conspiracy which tends to show that the defendant was not acting independently. Accordingly, we examine appellant's evidence in support of its conspiracy allegations.

1. *The Distributor Defendants*

[5] The distributors possessed an absolute right to refuse to license films to The Movie as long as their decisions were based upon independent business judgment. *Colgate,* 250 U.S. at 307. The distributors presented evidence to the trial court from which a trier of fact could find that the decision to license films to UA and the Nickelodeon rather than to The Movie was based on such factors as the perceived inferiority and consequently lower grossing potential of The Movie's theatre house and the allegedly inferior terms offered in The Movie's bids. Thus, under *Barnes,* the defendants rebutted the allegations of conspiracy, and it was incumbent upon the plaintiff to come forward with specific factual support of its conspiracy claim. We believe the plaintiff did present ample evidence to rebut defendants' evidence of independent business decisions and to support plaintiff's allegations of an illegal boycott. We, therefore, reverse the trial court's summary adjudication of the section 1 claims against all of the Group I distributor defendants.

Appellees contend that the lower court's record contained no admissible evidence or assertion of any defendant distributors' having received *superior* bids from The Movies and having rejected them in favor of defendant exhibitors. Appellees fail to recollect the exhibits N-1 through N-16 to the declaration of Larry Snyder in opposition to defendants' various motions for summary judgment. While it could be argued, as appellees also urge here, that none of the appellant's bids were superior, that determination is an issue of fact which should be decided by summary judgment only if the trial court can find that no reasonable jury could find on that question in favor of the non-moving party. *See Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 248 (1986). Some of the bids were arguably superior.[4]

[6] There was evidence before the trial court indicating that these distributors had refused to even receive bids from The Movie until they received threatening correspondence from The Movie's attorney. The distributors have cited no legitimate business justification for a refusal to even receive an exhibitor's bid, nor can this court conceive of how such conduct could reflect sound business judgment. To the contrary, such behavior raises the inference that the distributors would not have licensed films to The Movie even if presented with consistent lucrative bids superior to those of the other exhibitors. This circuit has recognized that a distributor's repeated rejection of lucrative bids in an anticompetitive market environment raises an inference of conspiratorial antitrust conduct. *See Harkins,* 850 F.2d at 484. The evidence that UA reaped roughly 96.9% of all revenues from first-run commercial films shown in Santa Cruz reflects an anticompetitive market situation. In such an environment, the distributors' refusal to even receive a new exhibitor's bids "tends to exclude the possibility of independent action," and at least raises an issue of fact as to their participation in the alleged boycott.

[7] This circuit has recognized that it is not necessary for a plaintiff to show an explicit agreement among defendants in support of a Sherman Act conspiracy, and that "concerted action may be inferred from circumstantial evidence of the defendant's conduct and course of dealings." *Harkins,* 850 F.2d at 477 (1988) (quoting *Dimidowich v. Bell & Howell,* 803 F.2d 1473, 1479 (9th Cir. 1986). We conclude, therefore, that appellant did present sufficient evidence to present a triable issue on the section 1 claim of conspiracy to restrain trade in

[4]See, for example, Exhibits N-1, N-4, N-6, N-7, and N-12 to the deposition of Larry Snyder in opposition to defendants' motions for summary judgment.

the form of a group boycott of appellant through split agreements. Our conclusion is reached in the context of evidence before the trial court of awards of films without any bids at all, bid negotiations excluding appellant, bid-tipping, adjustments to licensing agreements made to UA regularly, but to appellant rarely, if ever, and the statistics of film licenses awarded. The appellant should, therefore, have been allowed to proceed to trial on the section 1 claims against the Group I distributors. We accordingly reverse the trial court's grant of summary judgment as to these defendants.

2. *Defendant Exhibitor United Artists*

[8] The appellant also presented evidence to the trial court which raises a material issue of fact as to UA's participation in an agreement in restraint of trade. The Chiarrapotti and Raney statements, which the court erroneously excluded, provided some evidence in support of the allegations of UA's participation in an illegal split agreement. The absence of any evidence that UA and the Nickelodeon ever bid against each other for a film during the relevant period, as well as the pattern evidence indicating that UA had 96.9% of the revenue from first-run commercial films which played in Santa Cruz during the relevant period while Nickelodeon had 69.9% of the revenue from first-run art films shown during that period, provided further evidence in support of the allegations of participation in an illegal split agreement.

Appellees first argue that it is impossible to classify types of films. They admit, however, that the exhibitors in this lawsuit did differ in the types of films they preferred to play: the Nickelodeon specializing in foreign and more sophisticated subject films, UATC and Scotts Valley playing mostly general audience films. Appellees' contention, however, that no "pattern" existed besides the independent, legitimate business, and artistic decisions of the exhibitors misses the point. The question is not whether an individual exhibitor has the "right" to specialize; it cannot be disputed that every exhibi-

tor has the right, and perhaps even laudable business acumen to "specialize" in one type of film, such as "art" or "commercial." The relevant inquiry, rather, is whether the defendant exhibitors conspired to exclude any and all other entrants into the movie exhibition market. For this, the statistical pattern evidence, along with other evidence, contributes to the raising of a material issue of fact.

Appellant further offered evidence of specific instances where UA advertised films prior to the completion of bidding, allegedly indicating confidence and ultimate knowledge that it would obtain the films. Although UA argues that it is a common practice in the film industry to obtain and display promotional posters for films that have not yet been licensed, UA offered no explanation for the evidence that, in addition to displaying posters, on at least one occasion it had placed an advertisement in a local newspaper advertising a film it had not yet been awarded.

Appellant also presented to the trial court a letter sent to Hal Snyder from The Movie's film buyer, documenting an instance where a non-defendant distributor had agreed to license a particular film to The Movie, assuring the film buyer that The Movie could have it because UA had shown no interest in the film in northern California. The distributor later informed The Movie that it was canceling its agreement in order to license the film to UA. This evidence suggests that UA wielded such power in the Santa Cruz market that a distributor would rather breach an agreement with The Movie than deny UA a film.

Viewing the above evidence and the inferences that may be drawn therefrom collectively and in the light most favorable to the appellant, we cannot say that there was an absence of any genuine issue of material fact. Therefore, UA was not entitled to prevail as a matter of law. The summary adjudication of the section 1 claims in favor of UA must be reversed.

3. *Evaluation of the Unreasonable Restraint of Trade Allegations Under the "Per Se" Rule or the "Rule of Reason"*

[9] To the extent that the district court held that a split agreement should be evaluated under the rule of reason because it constituted a non-price restraint of trade, the court erred. It should have applied the illegal *per se* rule.[5]

This circuit has recently ruled on this issue. In *Harkins*, 850 F.2d at 486, we noted that *per se* treatment is appropriate "where joint efforts by firms disadvantage competitors by inducing suppliers or customers to deny relationships the competitors need in order to compete." We concluded that an alleged split agreement, if proven, would be illegal *per se*. Appellees dispute the appellant's reliance on *Harkins* on several grounds. First, they claim that the "*per se* rule" in that case was only *dicta*. Second, they claim that all cases finding *per se* treatment appropriate for a split agreement have demonstrated that the agreement was to depress film rentals to the distributors, eliminate guarantees to those distributors, or otherwise affect the terms of licensing for films, i.e., antitrust injury. Appellees contend that appellants have failed to even allege these factors. One of the cases relied on in *Harkins*, appellees point out, *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), supports the proposition that a *per se* analysis is not appropriate where no antitrust injury has been alleged. The United States Supreme Court in that case found that plaintiff failed to prove an antitrust violation when it demonstrated injury to itself

[5]Appellees contend that the district court referred to the rule of reason in mere *dicta* and, therefore, that the issue to which it referred cannot be the basis for a reversal. They argue that the district court never reached the question whether the rule of reason or the *per se* analysis should be used because both first require proof of an agreement, such as a split agreement, which the court failed to find. Since we find an issue of fact exists regarding the existence of a split agreement, we address the applicability of the "rule of reason" analysis.

but not to competition. *Northwest Wholesale Stationers,* 474 U.S. at 297 n.9.

[10] In the instant case, however, the split agreement is allegedly employed to restrict entry of other exhibitors into the Santa Cruz market for any film. If so, such conduct would cause antitrust injury in the form of a boycott, a conspiracy in restraint of trade in violation of 15 U.S.C. § 1. In fact, in *Northwest Wholesale Stationers,* 472 U.S. at 294, the court opined that in cases of group boycotts that directly or indirectly cut off necessary access to customers or suppliers, the *per se* rule applies because the likelihood of antitrust injury is clear.

On remand, the trial court should instruct the jury accordingly.

C. *SECTION 2 CLAIMS: MONOPOLIZATION*

The section 2 monopoly claims in this case were directed only against the exhibitor defendants. Appellant alleged that UA attempted to monopolize, and did monopolize, the first-run commercial film market in Santa Cruz. Appellant also alleged a conspiracy between the two exhibitors to monopolize the market. The district court granted the exhibitors' motions for summary judgment as to all of the section 2 claims. As defendant Nickelodeon has since been dismissed from the case, we review the court's decision as to defendant exhibitor UA only.

Appellees argue that appellant has abandoned its attempt and conspiracy claims by not addressing them in its opening brief. While it is true as a general principle that issues not briefed by an appellant will be deemed abandoned and not considered on appeal, in this case The Movie did not aban-

don the claims, but gave them sufficient, albeit brief, mention.[6]

1. *Monopolization and Attempt to Monopolize*

To establish monopolization under section 2 of the Sherman Act, a plaintiff must prove:

(1) possession of monopoly power in the relevant market;

(2) willful acquisition or maintenance of that power; and

(3) causal antitrust injury.

Syufy Enterprises v. American Multicinema, Inc., 793 F.2d 990, 993 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987), *cert. denied*, 479 U.S. 1034 (1987).

To establish an attempt to monopolize, a plaintiff must prove:

(1) specific intent to control prices or destroy competition;

(2) predatory or anticompetitive conduct to accomplish the monopolization;

(3) dangerous probability of success; and

(4) causal antitrust injury.

Transamerica Computer Co., Inc. v. International Business Machines, 698 F.2d 1377 (9th Cir.), *cert. denied*, 464 U.S. 995 (1983).

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[6]Opening Brief for Appellant at 47.

a. *Monopoly Power*

Appellee UA asserts that appellant has presented no direct evidence of UA's alleged monopoly power. However, the Supreme Court has acknowledged that the existence of monopoly power "ordinarily may be inferred from the predominant share of the market." *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (finding that a market share of 87% could sustain a finding of monopoly power). This circuit has stated that, although market share does not alone determine monopoly power, market share is perhaps the most important factor to consider in determining the presence or absence of monopoly power. *Pacific Coast Agric. Export Ass'n. v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1204 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976). Moreover, in that same case the court held that a market share as low as 45-70% may support a finding of monopoly power, if accompanied by other relevant factors. *Pacific Coast*, 526 F.2d at 1204. The appellant's showing that UA's gross revenues were as high as 96.9% of the first-run commercial film exhibition revenues in Santa Cruz, and that Nickelodeon's gross revenues were as high as 69.9% of the first-run art film exhibition revenues, at least raises an issue of fact as to the exhibitor UA's possession of monopoly power, particularly in light of the other evidence in the record of the exhibitors' power to exclude competition from the Santa Cruz market.

UA points out that market share alone does not definitively establish monopoly power. UA goes on to argue that its high market share could not possibly create an inference of monopoly power because of (1) the low barriers to entry into that market; and (2) the distributors' ability to control the licensing of their copyrighted films. UA seems to have drawn this theory from this court's decision in *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360 (9th Cir.), *cert. denied*, 109 S. Ct. 180 (1988), wherein we stated that "[s]ubstantial market power can persist only if there are significant and continuing barriers to entry." 838 F.2d at 366

(internal quotations omitted). UA argues that the relevant Santa Cruz market had no barriers to entry and that each film's distributor placed significant constraints on defendant's monopoly power. If borne out by the facts, this argument finds strong support in our recent decision in *United States v. Syufy Enters.*, No. 89-15475, slip op. at 4523 (6th Cir. May 9, 1990). In *Syufy*, we explained that the absence of entry barriers is always relevant to, and often determinative of, questions of monopoly power, because "[i]f there are no significant barriers to entry . . . any attempt to raise prices above the competitive level will lure into the market new competitors able and willing to offer their commercial goods and personal services for less." Slip op. at 4532. At this point in the litigation, however, UA's arguments do no more than clash with the evidence offered by appellant that UA and Nickelodeon successfully excluded potential competitors from the Santa Cruz market. In light of the conflicting evidence on this issue, summary judgment was not appropriate.

b. ***Willful Acquisition or Maintenance of Power, Intent to Destroy Competition, Anticompetitive Conduct***

The previously discussed evidence of the split agreement and alleged attempt to boycott The Movie from the market raises a question of fact as to whether UA willfully acquired or maintained monopoly power by engaging in predatory or anticompetitive conduct designed to destroy competition. Appellees, on the other hand, argue that the mere semblance of a split agreement is not enough to raise a question of material fact; they claim that appellant's failure to introduce any evidence that UA or any of the distributor defendants had a conscious commitment to a common scheme to achieve an unlawful objective, i.e., to boycott The Movie, justified granting summary judgment. In other words, appellees contend that in addition to proving that UA had agreed with Nickelodeon to refrain from bidding against one another, to maintain their action, plaintiff also was required to show that UA

secured the cooperation of distributors in excluding plaintiff from the first run market.

Such is not the case. The showing of a possible split agreement is one piece of circumstantial evidence from which a jury may infer a willful acquisition or maintenance of monopoly power. Market share is another. The fact that UA acquired its prior competitor Kindair, thus eliminating its only serious competition in the market, is further evidence of anti-competitive conduct on the part of UA, albeit prior to the time of The Movie's entry into the market. Together, these pieces of evidence, particularly examined in the context of a highly anti-competitive environment, are sufficient to raise a material issue of fact as to whether UA willfully maintained monopoly power or engaged in anticompetitive conduct with the intent to destroy or discourage competition. While it may be true, as appellees contend, that the alleged discriminatory adjustments are common in the industry, and while it may also be true that appellant never presented evidence of monopolistic profits, the evidence discussed above suffices to raise a material issue of fact on this element of the section 2 claim.

c. *Causal Antitrust Injury*

Appellees argue that appellant has failed to address the threshold issue of antitrust injury: injury to interbrand competition in the relevant market. Whereas appellant's original complaint contained allegations that the distributor appellees agreed to boycott appellant who was a "price cutter" so as to eliminate price competition, that consumers were forced to pay higher prices to attend theaters, and that the availability of films in Santa Cruz was reduced, appellant has since abandoned those claims. According to appellees, the appellant admitted in depositions of H. Snyder that the quality or quantity of films being released in Santa Cruz has experienced no change, and that pricing to the consumer has not been affected by any conduct of appellees.

We find, however, that appellant offered sufficient evidence from which a trier of fact could conclude that The Movie suffered causal antitrust injury as a result of the exhibitors' alleged wrongful conduct. Since, under *Harkins*, a split agreement, if proved, would be illegal *per se*, no further demonstration is required to prove an anticompetitive effect. *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85, 103-04 (1984). Although an anticompetitive effect is presumed, however, a plaintiff must still show that its injury was caused by anticompetitive acts. *Newman v. Universal Pictures*, 813 F.2d 1519, 1522-23 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 180 (1988). Appellant accomplished this by alleging that it was cut off from access to the film supply necessary to allow it to compete.

2. *Conspiracy to Monopolize*

The evidence discussed previously, which suggested the existence of a split agreement between UA and the Nickelodeon, acquiesced in by certain distributors, raises a question of fact as to whether UA engaged in concerted action in maintenance of its alleged monopoly power. Since such conduct, if proved, would violate section 2 of the Sherman Act, the trial court erred in granting the motion for summary judgment on the conspiracy claim.

IV. *CONCLUSION*

[11] The record indicates that the appellant presented specific facts to the trial court to support its section 1 claims against all appellees. It further appears that there was sufficient evidence in the record to support the section 2 claim against UA. We, therefore, reverse the district court's grant of summary judgment and remand these claims for trial.

REVERSED AND REMANDED.

APPENDIX B

Order of the
United States Court of Appeals for the Ninth Circuit
Denying Petitions for Rehearing and Rejecting Suggestions
of *En Banc* Consideration
(filed March 14, 1991)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
MAR 14 1991
CLERK, U.S. COURT OF APPEALS

THE MOVIE 1 & 2,
a general partnership,

Plaintiff-Appellant,

v.

UNITED ARTISTS
COMMUNICATIONS,
INC. et al.,

Defendants-Appellees.

No. 88-1734

D.C. No. CV-86-20390-RPA

ORDER

Before: CHAMBERS and WIGGINS, Circuit Judges, and BREWSTER,* District Judge.

The panel has voted to deny appellees' petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellees' petition for rehearing are denied and the suggestions for rehearing en banc are rejected.

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* Hon. Rudi M. Brewster, United States District Judge for the Southern District of California, sitting by designation.

APPENDIX C

Opinion and Order
Granting Summary Judgment and Dismissing State Claims
United States District Court
Northern District of California
in
Movie 1 & 2 v. United Artists Communications
Reported at 681 F. Supp. 654 (N.D. Cal. 1987)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THE MOVIE 1 & 2,
Plaintiff,
v.
UNITED ARTISTS COMMUNICATIONS, INC.; et al.,
Defendants

No. C 86-20390 RPA

681 F. Supp. 654

December 22, 1987, Decided, Filed and Entered

OPINION: ORDER GRANTING SUMMARY JUDGMENT AND DISMISSING STATE CLAIMS

AGUILAR, District Judge:

I. INTRODUCTION

Plaintiff, a Santa Cruz movie theatre, sued two competing motion picture exhibitors and nineteen film distributors alleging antitrust violations of the Sherman Act and pendent state claims. The defendants' simultaneously brought four separate summary judgment motions which came on for hearing December 11, 1987. The Court has received, read, and considered all papers submitted on the motions, and in addition, heard the argument of counsel. Good cause appearing therefor, the Court GRANTS the summary judgment motions on the first, second, and third claims for relief. Additionally, the Court dismisses jurisdiction over the fourth and fifth state law claims for the reasons set out below.

I. FACTUAL BACKGROUND

In February of 1984, Harold Snyder and his two sons, David and Larry Snyder opened The Movie 1 & 2, [The Movie] a two screen motion picture theatre with 225 seats in each auditorium, with the intent of exhibiting what are termed "commercial" and "art" pictures on a first run basis. The theater is located in downtown Santa Cruz, California, in a converted storefront it shares with a moped shop. It appears to be a nice, clean, medium sized theatre.

Santa Cruz has 9 theatres with 23 individual screens and two drive-in screens in addition to The Movie. Defendant United Artist Communications [UA] operates 5 theaters with a total of 11 screens which show first run movies.

Defendant Nickelodeon Inc. operates two theatres, one, the Nickelodeon, with 4 screens, plays mostly first run films, the other, the Sashmill, plays vintage movies. The owners of the Nickelodeon, William and Nancy Raney, have emphasized exhibition of "motion pictures with a more serious theme, motion pictures which [they] believe[] educate as well as entertain." The Nickelodeon is colloquially known as an art house for its choice of movies.

Scott's Valley theatre, a non-defendant in this suit, has 4 screens which play both first run and sub-run pictures. The drive-in theatre has 2 screens, although plaintiffs assert that by its nature, the drive-in does not compete with the "hard top" theatres.

The other defendants in this case are 10 major motion picture distributors classified as the Group I distributors, and the denominated Group II distributors of 9 independent

distribution companies.[1]

Distributors have sweeping discretion in licensing their movies. *Universal Amusements v. General Cinema*, 635 F.Supp. 1505, 1515-1517 (S.D. Tex. 1985). They take into consideration a myriad of factors, such as the percentage terms and guarantees offered, theatre quality, seating capacity, location and performance records. The distributors assert that the single most important factor in deciding how to license a picture is the perceived "grossing potential" of the theatres. Grossing potential is based upon a perception of the theatre's past grossing history on comparable motion pictures. They note that because new theatres have no grossing history, it is common practice for the new entrant to offer substantial guarantees in order to win pictures and develop a history.

Plaintiff brought this antitrust suit for damages and injunctive relief pursuant to § 4 of the Clayton Act (15 U.S.C. § 15) for violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1,2), and state law claims of unfair competition and interference with prospective advantage.

Plaintiffs allege that the two exhibitor defendants entered into an illegal split whereby UA monopolized the first run commercial film exhibition market and the Nickelodeon monopolized the first run art film exhibition by conspiring to

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1. Group I consists of Paramount Pictures Corporation; Warner Bros. Distributing Corporation; Columbia Pictures Industries, Inc; TriStar Pictures, Inc.; Twentieth Century Fox film Corporation; Universal Film Exchanges, Inc.; MGM/UA Distribution Company; Orion Pictures Distribution Corporation; Orion Classics; and Buena Vista Distribution Co. Group II consists of Cannon Releasing Corp.; New World Pictures, Ltd.; European Classics; Skouras Pictures; Kino International Corp.; Island Pictures, Inc.; Cinecom International Films; Cardinal Films; and Samuel Goldwyn Company.

allocate the commercial and art films to their respective theatres. Plaintiffs further allege that the distributors participated in this illegal allocation scheme to discriminate against The Movies in furtherance of the monopolies.

The pattern of film exhibition in Santa Cruz is indeed characterized by the Nickelodeon showing mostly "art" films and the UA predominantly commercial films. The significance of this pattern forms the basis of both plaintiff's uit and defendants' summary judgment motions.

II. DISCUSSION

The Court has before it summary judgment motions from the Nickelodeon, UA, Cinecom, and jointly, 17 of the Group I and II distributors.[2]

The Court will review each of the plaintiff's claims in light of the summary judgment attack to determine whether plaintiff has come forward "with specific facts showing that there is a genuine issue of material fact" to support the allegations of the complaint as to the various defendants. Rule 56(c); *Matsushita Electrical Industrial Co. v. Zenith Radio, et al.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986); *Celotex v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986). There is no issue for trial unless there is sufficient evidence favoring the plaintiff for a jury to return a verdict for them. *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S. Ct. 2505, 2516 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id., cites omitted.* Although in antitrust litigation, summary judgment is disfavored if extensive factual determinations must be made concerning intent and motive, *Betaseed, Inc. v. U & I Inc.*, 681 F.2d

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2. Kino Corporations is not a party to any of the case proceedings.

1203, 1207 (9th Cir. 1982), it is nevertheless "appropriate in the absence of any significant probative evidence tending to support the complaint." *Theee Movies of Tarzana v. Pacific Theatres*, 828 F.2d 1395 (9th Cir. 1987).

A. *Group Boycott in Violation of 15 U.S.C. § 1.*

The Movie alleges a 15 U.S.C. § 1 conspiracy in the unreasonable restraint of trade whereby the defendant exhibitors coerced and induced the defendant distributors to refuse to grant plaintiff licenses for first run commercial and art motion pictures. In effect, defendants as a group allegedly boycotted plaintiff with the purpose of eliminating it as a competitor and price cutter. The distributors allegedly refused to deal with plaintiff and exacted excessive terms for the movies it was allowed to license.

The allegations constitute non-price restraints of trade which are evaluated under the rule of reason. To establish a cause of action for an unreasonable restraint of trade under the rule of reason, the plaintiff must show (1) an agreement or conspiracy among two or more persons; (2) which is intended to harm or unreasonably restrain competition; and (3) which actually causes antitrust injury. *Theee Movies of Tarzana v Pacific Theatres*, 828 F.2d 1395 (9th Cir. 1987).

Plaintiff fails to prove the first element of the § 1 restraint of trade allegation -- that defendants acted as part of a conspiracy or pursuant to an agreement and not independently. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761, 104 S. Ct. 1464, 1469, 79 L. Ed. 2d 775 (1984). Under § 1, "independent action is not proscribed." The distributors have "a right to deal, or refuse to deal, with whomever [they] like as long as they do so independently." *Id.* To establish a violation of § 1, plaintiff must "show an agreement between two or more distributors or distributors and exhibitors to exclude plaintiff from the market." *Dahl*

Inc. v. Roy Cooper Co., 448 F.2d 17 (9th Cir. 1971). In addition, plaintiff must show the agreement with evidence that the inference of conspiracy is reasonable in light of the competing inferences of independent action. *Matshushita*, 106 S.Ct. at 1357.

The underpinnings of plaintiff's evidence is the inference of a split the Court is expected to draw from the alleged historical pattern of movie exhibition in Santa Cruz. In addition, plaintiff argues that the defendant distributors' acquiescence in the defendant exhibitors' illegal scheme to split and monopolize the art and commercial market supplies the element of agreement and proves the conspiracy. *United States v. Paramount Pictures*, 334 U.S. 131, 68 S. Ct. 915, 92 L. Ed. 1260 (1948). Accordingly, each film contract, between UA and a distributor and the Nickelodeon and a distributor, represents a meeting of minds to accomplish an unreasonable restraint of trade and therefore establishes a conspiracy for purposes of § 1 of the Act.

However, plaintiff fails to substantiate the allegations of a split or distributor acquiescence in refusing to license to The Movies with admissible evidence.

1. The Evidence of a Split Agreement

The plaintiff relies on the historical pattern of the Nickelodeon and UA's film exhibition to prove its allegations of a split agreement. Larry Snyder provides a definition of art and commercial films and then proceeds to denominate films which played at the UA and Nickelodeon screens as art or commercial. While the deposition testimony generally recognized that the Nickelodeon is known as an "art house" and the UA cinemas as commercial theatres, the mere fact that these exhibitors have played films consistent with their marketing strategy and philosophy does not constitute an unfair restraint of trade conspiracy. In addition, plaintiff's

booking agent, Carl Smiley, stated that he did not see a pattern which would lead him to believe that a split operated in Santa Cruz, and it was no longer reasonable to differentiate between "art" film and other product. Larry Snyder said in his deposition that the definition of an art film depended on each person and a film was art or commercial depending on where it played.

The alleged split is consistent with permissible and legal business activities. The Nickelodeon opened with the intent of showing specialized films and continues to do so, it competes for general theatre goers with UA and the other theatres in this manner. The permissible inferences to be drawn from plaintiff's ambiguous evidence of a pattern are limited under the antitrust laws. *Monsanto* held that conduct as consistent with permissible competition as with illegal conspiracy does not standing alone, support an inference of antitrust conspiracy." 465 U.S. at 764 (1984). The *Matsushita* Court noted that plaintiff had to present evidence "that tends to exclude the possibility that the alleged conspirators acted independently." 106 S. Ct. at 1357.

The only evidence submitted is inadmissible and contradicted hearsay from a third person, Mr. Al Charpiotti. The Court cannot consider this evidence under Rule 56(e).

Plaintiff does refer to an alleged split agreement that existed between UA and a previous competitor Kindair corporation in the 1970's. UA eventually bought out Kindair corporation before The Movie opened. Plaintiff has no standing to complain of this previous split which occurred before its entry onto the market and did not produce any antitrust injury to The Movie. *See Orion-Pictures v. Syufy Enterprises*, 829 F.2d 946 (9th Cir. 1987); *Dahl, Inc. v. Roy Cooper Co.*, 448 F.2d 17 (1971).

2. Distributor acquiescence in the alleged split

Plaintiff next argues that the exhibitors coerced or induced the distributors into joining the split. The complaint alleges that "UA informed distributors that it would refrain from dealing with distributors that did not honor the split arrangement." Plaintiff intends to prove this charge with reference to the alleged split. Once again, the ambiguous pattern does not by itself prove a conspiracy or any illegal activity. Plaintiff admits that it "knows of no conversations in which UA threatened to refrain from dealing with any distributor who did not honor the split."

Plaintiff also claims that the distributors engaged in anticompetitive conduct with the exhibitor defendants which deprived plaintiff of first run film exhibitions. The allegedly anticompetitive conduct consisted of bid tipping, moveovers, adjustments to film rental, and sham bidding. Plaintiff claims in addition that the distributors rejected its superior bids when licensing to the UA and Nickelodeon.

a. Bid Tipping

Plaintiff relies on a deposition statement from Mr. Bill Raney that while involved in oral negotiations, not bidding, he had on a few occasions received information about competing offers. The Snyder's had likewise received information from a distributor of Mr. Raney's offers on a film. Distributors on occasion, it appears, provide information concerning offers they have already received in order to receive a higher offer from another exhibitor. These disclosures occurred in negotiations, not written bidding and appear to have favored plaintiff and competition, In addition, Mr. Raney declared that he had not received bid tipping from any of the individual defendant distributors. Without any further evidence of bid tipping on particular movies or which defendant distributors may have engaged in bid tipping, the

Court cannot find this conduct as evidence of a conspiracy among the various defendants to restrain trade.

b. Moveovers

The Movie complains of moveovers, the change of auditoriums, within or outside of the same complex without any time elapsing between runs while under the licensing agreement for the first screen.

Plaintiff cites *United States v. Paramount Pictures*, 334 U.S. 131 (1948) to suggest that moveovers are *per se* prohibited by the courts, yet he fails to account for the particular context of that ruling. The Court therein was condemning the nationwide monopolization of theatre exhibition and distribution. Distributors in that case were entering formula deals with a circuit of theatres that covered broad geographic areas. The circuit was allowed to allocate playing time and film rentals among the various theatres as it saw fit, effectively eliminating the opportunity for other theatre owners to bid for the feature in their respective areas at all. In the present case, any possible moveovers would have occurred only after the competitive bidding.

In any event, plaintiff once again fails to offer admissible and sufficient evidence that the distributors and exhibitors entered into an unlawful agreement to allow moveovers in a discriminatory fashion. The absence of firm evidence undermines plaintiff's allegations of moveovers being used to further an anticompetitive conspiracy.

c. Film Rental Adjustments

Plaintiff objects to the instances where distributors adjusted the terms of the defendant exhibitors film rental licenses if the film performed poorly at the box office. As the Court emphasized in *Dahl v. Roy Cooper*, readjustment is commonplace in the industry where the film has had a

disappointing run and a low gross profit." 448 F.2d at 20.

e. Rejection of Bids.

As an alternative method of proving distributor involvement in a split, plaintiff alleges that there was a systematic pattern of rejecting its superior offers made to the distributor defendants. Since a distributor may refuse to deal with anyone as long as it is not acting under an agreement or conspiracy, plaintiffs would have to show a consistent pattern of distributors refusing substantially superior bids to prove that an agreement existed in the absence of direct evidence of such an agreement.

However, defendants represented at hearing that deposition testimony of plaintiff's expert shows that there is no evidence of superior bids. Plaintiff did not contradict this declaration.

In addition, the distributors complain of receiving inferior bids from plaintiffs. For example, guarantees are especially important to convince distributors to license to new theatre houses which do not have grossing histories. Each company felt that the guarantees offered by the plaintiff were insubstantial, when they were made at all. The plaintiff's own booking agents responded in their depositions that they believed the guarantees to be insubstantial. Carl Smiley stated that Mr. Snyder would not follow his recommendations on guarantees, and did not bid as much as Smiley wanted him to, if he bid a guarantee at all. Howard Taormino, stated that he felt the guarantees were insufficient. In only 43 instances out of a total of 182 first run pictures on which the plaintiff expressed an interest during the damage period was any guarantee offered at all.

In addition, the evidence shows that The Movie did not even bid on all of the films it claims it could have acquired the licenses for during the damage period.

This case is much like plaintiffs similar and unsuccessful 1971 antitrust suit, *Dahl v. Roy Cooper*, wherein the circuit stated "we cannot escape the conviction that Dahl really is complaining that it was not apportioned film by the distributors free from the necessity of competing for it." 448 F.2d at 19.

In summary, plaintiffs have failed to provide the court with evidence of an agreement between any two or more of the defendants in support of its first claim for relief. The circumstantial evidence of a split, allegedly discriminatory business practices and a group boycott of The Movies does not go beyond general allegations.

Accordingly, since plaintiff has failed to set out evidence which raises a material issue of fact as to the conspiracy element of the § 1 claim, the Court HEREBY GRANTS all four summary judgment motions.

B. *Monopolization Under 15 U.S.C. § 2*

The Movie alleges UA attempted to monopolize, and monopolized the first run commercial film market, and the Nickelodeon attempted to monopolize, and monopolized the first run art film market in violation of 15 U.S.C. § 2. To support this claim, plaintiff realleges the same practices as in the § 1 claim and adds: defendants induced and obtained unreasonably lengthy play time rights; induced distributors not to place motion picture licenses up for bid and induced distributors not to open many first run pictures in Santa Cruz until weeks after the pictures break or national opening.

To establish monopolization under § 2 of the Sherman Act, The Movie must prove:

1) possession of monopoly power in the relevant market;

2) willful acquisition or maintenance of that power; and

3) causal 'antitrust' injury." *Syufy Enterprises v. American Multicinema, Inc.* 793 F.2d 990, 993 (9th Cir. 1986) citing *Transamerica Computer Co., Inc v. International Business Machines Corp.*, 698 F.2d 1377, 1382 (9th Cir.) *cert. denied*, 464 U.S. 955, 104 S. Ct. 370, 78 L. Ed. 2d 329 (1983).

The elements of the attempt to monopolize claim are:

1) specific intent to control prices or destroy competition;

2) predatory or anticompetitive conduct to accomplish the monopolization; and

3) dangerous probability of success; and

4) causal 'antitrust' injury. *Transamerica Computer* 698 F.2d at 1382.

Transamerica focused on the relationship between the second elements of the attempt and monopolization offenses. "Conduct that does not constitute 'willful acquisition or maintenance' of monopoly power cannot constitute the 'predatory or anticompetitive conduct' required to establish the offense of attempt to monopolize." *Id.*

The Court finds that the Movie failed to set forth facts to establish that UA's and the Nickelodeon's conduct was not lawful. Therefore, since plaintiff fails to establish the second element if either facet of the second claim for relief, summary judgment is HEREBY GRANTED as to that claim.

The Court does not now discuss whether plaintiff established that defendants exercised a monopoly over the

relevant sub markets as discussed in *Syufy*, op. cit. It is sufficient for the purposes of this motion to find that defendants' conduct was lawful.

Plaintiff failed to adduce evidence of its allegations of a split; the coercion of distributors not to license films to The Movies; the UA's abuse of its massive buying power by leveraging its power in one town to obtain a license in Santa Cruz; or the delay of showing films in Santa Cruz until some time after they had premiered nationally, and the bid tipping. Most of these elements were discussed above. The allegations of holding back films was disproved by evidence that films opened in Santa Cruz at the same time as they did in San Francisco. As to the allegations of UA's abuse of its buying power, Larry Snyder said that his evidence of UA's coercion came from what he read in trade magazines about UA's buying power and the fact that UA was always being sued. This is insufficient.

Finally, as discussed above, plaintiff has submitted no evidence that UA or the Nickelodeon coerced the distributors into denying film licenses to The Movies. The distributors apparently denied the licenses based on poor bids or perceived poor grossing potential of this new theatre.

The Movie also complains of advance advertising, moveovers, and adjustments. Adjustments clearly fall into the category of "ordinary business practices typical of those used in a competitive market" which do not constitute anticompetitive conduct. *Conoco, Inc. v. Inman Oil Co., Inc.* 774 F.2d 895, 905 (8th Cir. 1985); As discussed above, *Dahl v. Roy Cooper* recognized these adjustments as commonplace in the movie industry. Other districts have recognized moveovers as common practice as well. *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 886 n.7 (8th Cir. 1978) (There is nothing inherently illegal or

improper about moveovers); *Ayers v. Pastime Amusement Co.*, 283 F.Supp. 773, 789 (D.S.C. 1968) The question is whether the moveovers were actually used in a discriminatory fashion. As discussed above, plaintiff fails to point the Court to particular moveovers granted in a discriminatory fashion with resultant injury to plaintiff.

Finally, plaintiff complains that UA and the Nickelodeon advertised films before they received the license to show the movie. This advertising, they argue, evidences defendants confidence that they would receive the film. The question for the Court however, is whether the advertising was illegal or predatory. Plaintiff does not address this issue. While it may be questionable practice to advertise films for which you do not have the license, this alone does not constitute monopolization.

Because plaintiff has failed to support its allegations of unlawful conduct with evidence which could withstand the motion for summary judgment, the Court HEREBY GRANTS the motions for summary judgment as to the second claim for relief.

C. *Combination and Conspiracy to Monopolize 15 U.S.C. § 2.*

Plaintiff's § 2 conspiracy to monopolize claim mirrors the § 1 conspiracy claim. Plaintiff relies on the alleged pattern of movie exhibition in Santa Cruz, which, as discussed above, does not by itself prove a conspiracy. Summary judgment is HEREBY GRANTED as to the third claim for relief, conspiracy to monopolize in violation of 15 U.S.C. § 2.

D. *Pendent State Law Claims*

The Court hereby exercises its discretion to relinquish its jurisdiction of the pendent state claims of unlawful business practice and interference with prospective economic

advantage. The fourth and fifth claims for relief are HEREBY DISMISSED from this Court's jurisdiction.

IV. CONCLUSION

The Court HEREBY GRANTS the four motions for summary judgment as to the first, second and third claims for relief. In addition, the Court DISMISSES the pendent state law claims. Judgment shall be entered for defendants.

IT IS SO ORDERED

DATED: December 22, 1987